

CHAPTER 8

WAR CRIMES AND COMMAND RESPONSIBILITY

References

1. Constitution, art. I, § 8, cls. 10 & 14, art. I, § 10, art. VI.
2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 49-51, 6 U.S.T. 3114, 75 U.N.T.S. 31, [hereinafter GWS].
3. Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, arts. 50-52, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS Sea].
4. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 102, 105-08, 129-131, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].
5. Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, arts. 146-148, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC].
6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, arts. 11, 85, 86, 87, reprinted in Dep't of Army, Pamphlet 27-1-1 [hereinafter DA Pam 27-1-1, Protocol I].
7. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 3, 36 Stat. 2277, 2290, 205 Consol. T.S. 277, 284 [hereinafter H IV].
8. International Committee of the Red Cross, Commentary on I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 at 351-73 (Jean S. Pictet ed., 1952) [hereinafter I Pictet].
9. UCMJ arts. 18, 21, 92 (1988).
10. Manual for Courts-Martial, United States, pt. I, § 2, R.C.M. 201(f)(1)(B), 201(g), R.C.M. 307(c)(2), R.C.M. 916 (1984).
11. Dep't of Defense, Directive 5100.77, DoD Law of War Program, ¶¶ C.3. & E.2.e.(3) (December 9, 1998) [hereinafter DOD Dir. 5100.77].
12. Dep't of Army, Field Manual 27-10, The Law of Land Warfare, ch. 8 (18 July 1956) [hereinafter FM 27-10].
13. Dep't of Army, Pamphlet 27-161-2, International Law, ch. 8 (23 Oct. 1962) [hereinafter DA Pam 27-161-2].
14. International Military Tribunal, TRIAL OF THE MAJOR WAR CRIMINALS (1947) (42 volumes).
15. TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950) (15 volumes) [hereinafter Trials of War Criminals].
16. United Nations War Crimes Commission, LAW REPORTS OF TRIALS OF WAR CRIMINALS (1948) (15 volumes).
17. United Nations War Crimes Commission, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION (1948).
18. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N.Doc. S/RES/808 (1993).

19. Report of the Secretary-General Pursuant to Para. 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159 (1993) [hereinafter Rept. of Secretary-General].
20. Rules of Procedure & Evidence, International Criminal Tribunal—Yugoslavia since 1991, Seventh Session, the Hague, U.N. Doc. IT/32/Rev. 5 (June 15, 1995).
21. S.C. Res. 955, U.N. SCOR, U.N. DOC. S/RES/955(1994), reprinted in 33 I.L.M. 1598, Nov. 8, 1994 [hereinafter Rwanda Statute].
22. 18 U.S.C. § 2441, P.L. 104-192 (War Crimes Act of 1996, as amended).
23. <http://www.igc.apc.org/tribunal>; <http://www.un.org/icty>.
24. William H. Parks, *Command Responsibility For War Crimes*, 62 MIL. L. REV. 1 (1973).
25. Sun Tzu, *THE ART OF WAR* (Samuel B. Griffith trans., Oxford Univ. Press 1963).
26. Lynn Montross, *WAR THROUGH THE AGES* 105, 164 (Third Edition, 1960).
27. Theodor Meron, *Crimes and Accountability in Shakespeare*, 92 Am. J. Int'l L. 1 (1998).
28. Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 Am. J. Int'l L. 1 (1992).
29. Yoram Dinstein & Mala Tabroy, *WAR CRIMES IN INTERNATIONAL LAW* (1996).
30. Henry T. King, Jr., *The Meaning of Nuremberg*, 30 Case W. Res. J. Int'l L. 143 (1998).

I. INTRODUCTION. AFTER THIS BLOCK OF INSTRUCTION, THE STUDENT WILL BE FAMILIAR WITH THE FOLLOWING:

- A. The history of the law of war as it pertains to war crimes and war crimes prosecutions, focusing on the enforcement mechanisms.
- B. The activities that constitute war crimes.
- C. The customary international law doctrine of command responsibility.
- D. Under what jurisdiction, in what forum, and subject to what defenses war crimes may be prosecuted.
- E. United States treaty and other obligations with respect to war crimes, as well as legislation and executive branch policies implementing those obligations

II. HISTORY AND DEVELOPMENT OF WAR CRIMES AND WAR CRIMES PROSECUTIONS.

- A. Although war is not a compassionate trade, rules regarding its conduct and trials of individuals for specific violations of the laws or customs of war have a long history.
- B. Warfare in China, 500 B.C. The ancient Chinese were governed by certain rules of war. For example, it was forbidden in combat to strike elderly men or further

injure an enemy previously wounded. SUN TZU, *THE ART OF WAR* (Samuel B. Griffith trans., Oxford Univ. Press 1963).

- C. Byzantine Empire, 527 - 1071 AD Even when surrounded by numerous and savage enemies, the Byzantine Horse-Archers' creed included immunity for women and other non-combatants. LYNN MONTROSS, *WAR THROUGH THE AGES* 105, 164 (Third Edition, 1960).
- D. Middle Ages. Warriors developed a code of conduct that became known as chivalry and the forerunner to modern laws of war. The code was a result of the notion that those that bore arms were honorable and those that did not lacked honor. The focus was on the preservation of honor between combatants, not on humanitarian protections for non-combatants. For example, although outlawed in many codes of chivalry, rape was considered a proper incentive in some armies for soldiers involved in siege warfare. *Jus Armorum* or *Jus Militare*, the Law of Arms, was not a body of law between nations; but rather, a body of norms which governed the conduct of military professionals. These rules regulated the conduct of soldiers within Christendom, but not those outside such as Muslims or non-Christians. Theodor Meron, *Crimes and Accountability in Shakespeare*, 92 Am. J. Int'l L. 1 (1998); Theodore Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 Am. J. Int'l L. 1 (1992); Yoram Dinstein & Mala Tabroy, *WAR CRIMES IN INTERNATIONAL LAW* (1996).
- E. The Scottish Wars of Independence From England. Scottish national hero Sir William Wallace was tried in England in 1305 for the wartime murder of civilians. GWS Barrow, ROBERT BRUCE 203 (1965) (reporting that Sir Wallace allegedly spared "neither age nor sex nor nun").
- F. The Trial of Peter Von Hagenbach, 1439. An international tribunal of judges from 28 states stripped Hagenbach of his knighthood and sentenced him to death for murder, rape, perjury and other crimes against "the laws of God and man," what today would be described as Crimes Against Humanity. William H. Parks, *Command Responsibility For War Crimes*, 62 MIL. L. REV. 1 (1973).
- G. The American War of Independence. The most frequently punished violations were those committed by forces of the two armies against the persons and property of civilian inhabitants. Trials consisted of courts-martial convened by commanders of the offenders. George L. Coil, *War Crimes of the American Revolution*, 82 MIL. L. REV. 171, 173-81 (1978).

- H. The American Civil War. In 1865, Captain Henry Wirz, a former Confederate officer and commandant of the Andersonville, Georgia prisoner of war camp, was tried and convicted and sentenced to death by a Federal military tribunal for murdering and conspiring to ill-treat Federal prisoners of war. J. McElroy, *ANDERSONVILLE* (1879); W.B. Hesseltine, *CIVIL WAR PRISONS* (1930).
- I. The Anglo-Boer War. In 1902, British courts-martial tried Boers for acts contrary to the usage of war. *THE MILNER PAPERS: SOUTH AFRICA, 1897-1899, 1899-1905* (1933).
- J. Counter-insurgency operations in the Philippines. Brigadier General Jacob H. Smith, U.S. Army, was tried and convicted by court-martial for inciting, ordering and permitting subordinates to commit “war crimes.” L. C. Green, *Command Responsibility in International Humanitarian Law*, 5 *TRANSNAT’L L. & CONTEMP. PROBS.* 319, 326 (1995); S. DOC. 213, 57th Cong. 2nd Session, p. 5.
- K. World War I. Because of German resistance to the extradition--under the 1919 Versailles peace treaty--of persons accused of war crimes, the Allies agreed to permit the cases to be tried by the supreme court of Leipzig, Germany. The accuseds were treated as heroes by the German press and public, and many were acquitted despite strong evidence of guilt. DA Pam 27-161-2 at 221.
- L. World War II. Victorious allied nations undertook an aggressive program for the punishment of war criminals. This included the joint trial of 24 senior German leaders (in Nuremberg) and the joint trial of 28 senior Japanese leaders (in Tokyo) before specially created International Military Tribunals; twelve subsequent trials of other German leaders and organizations in Nuremberg under international authority and before panels of civilian judges; thousands of trials prosecuted in various national courts, many of these by British military courts and U.S. military commissions. DA Pam 27-161-2 at 224-35; Norman E. Tutorow, *WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK* 4-8 (1986).
- M. Geneva Conventions. Marked the codification—beginning in 1949 when the conventions were opened for signature—of specific international rules pertaining to the trial and punishment of those committing “grave breaches” of the conventions. Pictet at 357-60.
- N. Post-World War II Insurgencies. Involved internal armed conflict thought to be outside the ambit of war crimes.

1. The object of international humanitarian law is to alleviate the suffering of the victims of armed conflict. Whether the conflict is internal or international, there is no distinction in terms of the resulting suffering. However, states are reluctant to adhere to the rules of international armed conflict internally primarily on the grounds that combatant immunity would arguably be available to insurgents or even mere bandits. Waldemar A. Solf, *Non-International Armed Conflicts*, 31 Am. U. L. Rev. 927 (1982).
 2. U.S. soldiers committing war crimes in Vietnam were tried by U.S. courts-martial under analogous provisions of the UCMJ. Major General George S. Prugh, *LAW AT WAR: VIETNAM 1964-1973* 76-77 (1975); W. Hays Parks, *Crimes in Hostilities*, Marine Corps Gazette, Aug. 1976, at 16-22.
 3. Panama. In a much-publicized case arising in the 82d Airborne Division, a First Sergeant charged, under UCMJ, art. 118, with murdering a Panamanian prisoner, was acquitted by a general court-martial. *See U.S. v. Bryan*, Unnumbered Record of Trial (Hdqtrs, Fort Bragg 31 Aug. 1990) [on file with the Office of the SJA, 82d Airborne Div.].
- O. The Persian Gulf War. Although the United Nations Security Council (UNSC) invoked the threat of prosecutions of Iraqi violators of international humanitarian law, the post-conflict resolutions were silent on criminal responsibility. S.C. Res. 692, U.N. SCOR, 2987th mtg., U.N. Doc. S/RES/692 (1991), *reprinted in* 30 I.L.M. 864 (1991); *see also* Theodore Meron, *The Case for War Crimes Trials in Yugoslavia*, Foreign Affairs, Summer 1993, at 125.
- P. Pol Pot. Because internal strife and civil wars are still largely outside the parameters of war crimes and the grave breaches provisions of the Geneva conventions, no attempts have been made to bring to justice those committing atrocities in Cambodia, Uganda, and northern Iraq (among other places). Current ad hoc international tribunals pursuant to Chapter VII of the UN Charter may be the last.
- Q. The Former Yugoslavia. On 22 February 1993, the UNSC established the first international war crimes tribunal since the Nuremberg and Far East trials after World War II. S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993). On 25 May 1993, the Council unanimously approved a detailed report by the Secretary General recommending tribunal rules of procedure, organization, investigative proceedings and other matters. S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993).

R. Rwanda. On Nov. 8, 1994 the UNSC adopted a Statute creating the International Criminal Tribunal for Rwanda. S.C. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955 (1994). Art. 14 of the Statute for Rwanda provides that the rules of procedure and evidence adopted for the Former Yugoslavia shall apply to the Rwanda Tribunal, with changes as deemed necessary. This is deemed an internal armed conflict as opposed to the International armed conflict in the Former Yugoslavia.

S. Current Tribunals

1. Distinct From Prior Tribunals

- a. Created before conflict ceased
- b. Criminal vs. military tribunals
- c. Created by UNSC resolution
- d. Stricter due process provisions
- e. Prosecute all parties to the conflict
- f. Parties to conflict can not sit in judgment
- g. Authorized to demand cooperation of all UN Member states, not just parties to treaty (Dayton Accord)
- h. Provides for protection of witnesses and victims
- i. Provides for an appellate chamber (five judges)

2. International Criminal Tribunal for the Former Yugoslavia

- a. Created to assist in restoring peace and stability in the region through the administration of justice.
- b. Pursuant to UNSC Res. 827, "The Statute," the Tribunal has the authority to prosecute persons for serious violations of international humanitarian law committed in the former Yugoslavia since 1991, including grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. The statute also establishes individual command responsibility under a theory of superior or command responsibility.

- c. Eleven judges were elected by the UN General Assembly from a list of nominees submitted by the UNSC on September 15, 1993. Prosecutor appointed on August 15, 1994, by the UNSC. Judges are from countries other than those involved in conflict. Sit for four-year terms. First terms expired Nov. 1997. There are currently 14 judges, 15 authorized, and 729 staff members on the court.
- d. Sits in The Hague, Netherlands in a modern insurance building now rented by the UN. Modern bright facility. Totally computerized, library, law clerks, and staff. The ICTY's budget has grown from \$276,000 in 1993 to \$95,942,600. GAO has indicated the court needs more money. Report to the Chairman, Committee on Foreign Relations, GAO, *War Crimes Tribunal's Workload Exceeds Capacity*, B-27946 (June 2, 1998).
- e. Since its inception, 94 individuals have been publicly indicted in 67 public indictments. Eighteen have had charges dropped against them, seven indictees have died, and one has been acquitted. Thirty-nine accuseds are currently in some form of proceeding before the court. Twelve accuseds are at the appeal stage, six are in on-going trials, sixteen are at the pre-trial stage, and two have begun to serve their sentences. Of those in custody, 19 have been captured by international forces, 12 voluntarily surrendered, and nine were arrested by national police.
- f. Summary of Trials:
 - (1) *Drazen Erdemovic*, 29 November 1996, pleaded guilty to a crime against humanity and was sentenced to 10 years. The Appellate Chamber found that his plea was not informed and remitted his case to the Trial Chamber. He subsequently reentered a plea on 5 March 1998 to war crimes and was sentenced to 5 years. He is currently servicing his sentence in Norway.
 - (2) *Dusko Tadic*, 7 May 1997, was found guilty of 11 counts of violations of the laws or customs of war and crimes against humanity, and sentenced to 20 years. Both the Defense and Prosecution appealed. On July 15, 1999, the Appellate Chamber reversed the Trial Chamber's assertion that the conflict was not international in nature and found *Tadic* guilty of grave breaches of the Geneva Conventions as well. *Tadic* was ultimately sentenced to 20 years.

- (3) *Goran Jelsic*, pleaded guilty to 31 counts of crimes against humanity and violations of the laws or customs of war. He was found not guilty of the crime of genocide. On December 20, 1999, he was sentenced to 40 years in prison. He is now awaiting appeal.
- (4) *Zdravko Mucic*, (co-defendant in the Celebici village case) 16 November 1998, found guilty on 13 counts of grave breaches of the Geneva Conventions and violations of the laws or customs of war, and was sentenced to 7 years. Both the prosecution and defense have appealed.
- (5) *Hazim Delic*, (co-defendant in the Celebici village case) 16 November 1998, found guilty of 13 counts of grave breaches of the Geneva Conventions and violations of the laws or customs of war, and was sentenced to 20 years. Both the defense and prosecution have appealed.
- (6) *Esad Landzo*, (co-defendant in the Celebici village case) 16 November 1998, found guilty of 17 counts of grave breaches of the Geneva Conventions and violations of the laws or customs of war, and sentenced to 15 years. The defense has appealed.
- (7) *Anto Furundzija*, 10 December 1998, found guilty on two counts of violations of the laws or customs of war, and sentenced to 10 years. The defense has appealed.
- (8) *Zlatko Aleksovski*, 23 March 1999, found not guilty of two counts of grave breaches of the Geneva Conventions, found guilty as both an individual and superior on violations of the laws or customs of war, and sentenced to two years and six months. He was given credit for two years, 10 months and 29 days and immediately released. The appellate chamber ordered him back into custody and increased his sentence to seven years.
- (9) *Zejnir Delalic*, (co-defendant in the Celebici case) 16 November 1998, found not guilty of 11 counts of grave breaches of the Geneva Conventions and violations of the laws or customs of war. He was immediately released, the prosecution has appealed.
- (10) *Zoran Kupreskic*, 14 January 2000, found guilty of one count of a crime against humanity and sentenced to ten years. He has appealed.

- (11) *Mirjan Kupreskic*, 14 January 2000, found guilty of one count of a crime against humanity and sentenced to six years imprisonment. He has appealed.
- (12) *Vlatko Kupreskic*, 14 January 2000, found guilty of one count of a crime against humanity and sentenced to 6 years imprisonment. He has appealed.
- (13) *Drago Josipovic*, 14 January 2000, found guilty of three counts of crimes against humanity and sentenced to 25 years imprisonment. The prosecution has appealed.
- (14) *Dragen Papic*, 14 January 2000, found not guilty of one count of crimes against humanity and immediately released.
- (15) *Vladimir Santic*, 14 January 2000, found guilty of three counts of crimes against humanity and sentenced to 25 years imprisonment. The prosecution has appealed.
- (16) *Tihomir Blaskic*, 3 March 2000, found guilty of three counts of crimes against humanity, six counts of grave breaches of the Geneva Convention, and ten counts of the laws or customs of war and sentenced to 45 years imprisonment.

3. International Criminal Tribunal for Rwanda

- a. The primary objectives are to restore regional peace and stability through the administration of justice and to eliminate the culture of impunity that has characterized the Rwandan culture for the past two decades by seeking to hold individuals responsible for the genocide.
- b. To prosecute genocide and other serious violations of international humanitarian committed in Rwanda and by Rwandans in neighboring states during 1994. Violations are defined as genocide, crimes against humanity, and violations of article 3 common to the four Geneva Conventions and of Protocol II.
- c. Made up of three trial chambers of three judges each and an appellate chamber of five judges from the ICTY. Judges sit for four-year terms. There are 729 persons working for the tribunal with its \$79,753,900 budget. Sits in Arusha, Tanzania, a neighboring state, which is not easily accessible due to bad roads and minimal air transport.

- d. There have been 29 indictments issued against 50 individuals. Forty-four individuals are currently in custody.
- e. Summary of Trials:
 - (1) *Jean-Paul Akayesu*, 2 September 1998, found guilty of genocide and crimes against humanity and sentenced to life in prison. This was the first-ever conviction for the crime of genocide by an international tribunal. Both the accused and prosecutor have appealed.
 - (2) *Jean Kambanda*, 4 September 1998, pleaded guilty to six counts of genocide and crimes against humanity and sentenced to life in prison. The accused has appealed the sentence.
 - (3) *Omar Serushago*, 17 November 1998, pleaded guilty to genocide and crimes against humanity and sentenced to 15 years in prison.
 - (4) *Clement Kayishema and Obed Ruzindana*, trial ended on 17 November 1998. On May 21, 1999, *Kayishema* was sentenced to life and *Ruzindana* was sentenced to a term of 25 years.
 - (5) *Georges Anderson Nderubmwe*, June 1999, was sentenced to life in prison for genocide.
 - (6) *Alfred Musema*, June 1999, was sentenced to life in prison for genocide.
- 4. The International Criminal Court. Treaty is open for signature until 31 December 2000. It will become effective 60 days after 60 countries have ratified the document. Some predict that this will take approximately 5 to 6 years. Eighty-two countries have signed and nine, Belize, Fiji, Ghana, Italy, Norway, San Marino, Senegal, Tajikistan, and Trinidad/Tobago, have ratified the treaty.
 - a. Although the U.S. is in favor of a standing permanent forum to address war crimes, the U.S. does not support the treaty as written. Some of the concerns of the U.S. include:
 - (1) A state party, the UNSC, or the independent prosecutor may refer cases to the court. There is concern that under such a regime, prosecutions may become overly political in nature. For example, after the launch of *Tomahawk* missiles into the Sudan against a terrorist

chemical weapons plant, certain members of the Sudanese government called for the indictment of President Clinton at the ICC for starting an aggressive war. Today, the U.S. is the world's last remaining superpower and finds itself involved in a variety of peacekeeping, humanitarian, disaster relief, counter-terrorism and counter-proliferation operations. Referral, especially over non-parties, belongs with the UNSC, the body responsible for international peace and security.

- (2) The treaty violates the most basic of international law requirements that non-parties to a treaty cannot be bound by a treaty. Jurisdiction over non-party nationals in cases where the UNSC has not referred the matter to the ICC, exists where either the state of territory where the crime was committed or the state of nationality of the accused consents. This dual system of consent may lead to absurd results. For example, if an international force was used to put down a rogue state bent on domestic violations of international humanitarian law, the rogue state would have the ability to refer cases to the ICC allegedly involving war crimes committed by the international force on its territory and yet be able to completely avoid jurisdiction over its own actions.
- (3) The treaty includes a provision which allows party states to “opt out” of war crimes court jurisdiction over its national for seven years, as well as for any newly defined crime. (The crime of aggression has not yet been defined). This means that parties can opt out for seven years for violations of these crimes but non-state parties have no such ability to do so.
- (4) The ICC is not a UN body, yet the plan calls for funding by the UN. This creates a situation where non-state parties to the treaty that are parties to the UN will be paying for the court as well as party member states.

b. The U.S. supports several aspects of the treaty.

- (1) The statute seeks to define war crimes by including a “laundry list” of violations of the laws and customs of war. Moreover, it points out which apply in internal as well as international armed conflict.

- (2) The treaty requires that elements be drafted for the crimes listed in the treaty.
- (3) Evidentiary and procedural rules are to be established.
- (4) The protections against the release of classified information by a party and or third parties are adequate.
- (5) The defense of superior orders and the protection of mission essential property are officially recognized.
- (6) Two separate and distinct standards are set for command and superior responsibility.

III. WHAT IS A WAR CRIME?

- A. Definition. The lack of a clear definition for this term stems from the fact that both “war” and “crime” themselves have multiple definitions. Some scholars assert that “war crime” means any violation of international law that is subject to punishment. However, it appears that there must be a nexus between the act and some type of armed conflict.
 - 1. “In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as lawful members of armed forces, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders.” L. Oppenheim, 2 INTERNATIONAL LAW § 251 (7th ed., H. Lauterpacht, 1955); *accord* Telford Taylor, NUREMBERG AND VIETNAM 19-20 (1970).
 - 2. “Crimes committed by countries in violation of the international laws governing wars. At Nuremberg after World War II, crimes committed by the Nazis were so tried.” BLACK’S LAW DICTIONARY 1583 (6th ed. 1990); *cf.* FM 27-10, & 498 (defining a broader category of “crimes under international law” of which “war crimes” form only a subset and emphasizing personal responsibility of individuals rather than responsibility of states).
 - 3. “The term ‘war crime’ is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.” FM 27-10, at & 499. This definition is arguably too broad. The act must be somewhat serious in nature. For example, it difficult to imagine an EPW compound commander charged with the war crime of

failing to provide adequate recreational and educational opportunities to the PW's as required by the Third Geneva Convention.

4. As with other crimes, there is an Actus Reus and Mens Rea element.

B. The Nuremberg Categories. The Charter of the International Military Tribunal defined the following crimes as falling within the Tribunal's jurisdiction:

1. Crimes Against Peace. Planning, preparation, initiation, or waging of a declared or undeclared war of aggression, or war otherwise in violation of international treaties, agreements, or assurances. This was a charge intended to be leveled against high level policy planners, not generally at ground commanders.
2. Violation of the Laws and Customs of War. The traditional violations of the laws or customs of war. For example, targeting non-combatants.
3. Crimes Against Humanity. A collective category of major inhumane acts committed against any (internal or alien) civilian population before or during the war. *See* Charter of the International Military Tribunal, art. 6, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, *reprinted in* 1 TRIALS OF WAR CRIMINALS 9-16. *See generally* OPPENHEIM § 257 (noting that only one accused was found guilty solely of crimes against peace and two guilty solely of crimes against humanity).

C. Grave Breaches Versus Simple Breaches of the Law of War. The codification in 1949 of crimes involving certain serious conduct gave rise to a distinction between those crimes and acts violative of other customs or rules of war. For a grave breach, there must first be an international armed conflict. Common Article 2 of the Geneva Conventions must apply. Second, the victim must be a "protected person" in one of the conventions.

1. Grave Breaches. Serious felonies. Examples include:
 - a. Willful killing;
 - b. Torture or inhumane treatment;
 - c. Biological experiments;
 - d. Willfully causing great suffering or serious injury to body or health;

- e. Taking of hostages;
 - f. Extensive destruction of property not justified by military necessity;
 - g. Compelling a prisoner of war to serve in the armed forces of his enemy;
 - h. Willfully depriving a prisoner of war of his rights to a fair and regular trial. GWS, art. 50; GWS Sea, art. 51; GPW, art. 130; GC, art. 147
2. Simple Breaches. Examples include:
- a. Making use of poisoned or otherwise forbidden arms or ammunition;
 - b. Treacherous request for quarter;
 - c. Maltreatment of dead bodies;
 - d. Firing on localities which are undefended and without military significance;
 - e. Abuse of or firing on the flag of truce;
 - f. Misuse of the Red Cross emblem;
 - g. Use of civilian clothing by troops to conceal their military character during battle;
 - h. Improper use of privileged buildings for military purposes;
 - i. Poisoning of wells or streams;
 - j. Pillage or purposeless destruction;
 - k. Compelling prisoners of war to perform prohibited labor;
 - l. Killing without trial spies or other persons who have committed hostile acts;
 - m. Compelling civilians to perform prohibited labor;
 - n. Violation of surrender terms. *See* FM 27-10, & 504.
3. The Implications of Protocol I. *Cf.* DA Pam 27-1-1, Protocol I, arts. 11(4), 85.

- D. Common Article 3 to the Four Geneva Conventions. Minimum standards that Parties to a conflict are bound to apply, in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting parties. Nothing in Common Article 3 discusses individual criminal liability.
1. ICTY has held that prosecutions for violations of Common Article 3 can be brought in internal as well as international armed conflicts.
 2. The International Criminal Court statute provides for prosecution of violations of Common Article 3 in non-international armed conflicts.
 3. 18 U.S.C. § 2441 now permits prosecutions for violations of Common Article 3 in the U.S. federal court system.
- E. Genocide. In 1948, the U.N. General Assembly defined this crime to consist of killing and other acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, “whether committed in time of peace or in time of war.” Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 11, 1948, art. 2, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). U.S. ratification was given advice and consent by Senate in the Genocide Convention Implementation (Proxmire) Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (codified at 18 U.S.C. § 1091).
- F. Other Treaties. Violations of treaties to which the United States is a party also create bases for criminal liability. For example, the 1993 Chemical Weapons Convention and the 1980 Conventional Weapons Convention.
- G. Conspiracy, Incitement, Attempts, and Complicity. International law allows for punishment of these forms of crime. GPW, art. 129 (subjecting to penal sanctions “persons alleged to have committed, or to have ordered to be committed” serious war crimes) (emphasis added); Allied Control Council Law No. 10, art. II, & 2, Dec. 20, 1945, *reprinted in* 1 TRIALS OF WAR CRIMINALS 16; S. C. Res. 827, U.N. SCOR, U.N. DOC. S/RES/827 (1993), art. 7; S. C. Res. 955, U.N. SCOR, U.N.DOC S/RES/955, art. 6; FM 27-10, ¶ 500.
- H. Violations charged in current tribunals
1. International Criminal Tribunal for the Former Yugoslavia
 - a. Crimes against Peace are not among listed offenses to be tried.

- b. Violations of the Laws or Customs of War (War Crimes)--traditional offenses such as murder, wanton destruction of cities, towns or villages or devastation not justified by military necessity, firing on civilians, plunder of public or private property and taking of hostages.
 - (1) The Opinion & Judgment in the *Tadic* case set forth elements of proof required for finding that the Law of War had been violated:
 - (a) An infringement of a rule of International humanitarian law (Hague, Geneva, other);
 - (b) Rule must be customary law or treaty law;
 - (c) Violation is serious; grave consequences to victim or breach of law that protects important values;
 - (d) Must entail individual criminal responsibility; and
 - (e) May occur in international or internal armed conflict.
- c. Crimes Against Humanity. Those inhumane acts that affront the entire international community and humanity at large. Crimes when committed as part of a widespread *or* systematic attack on civilian population.
 - (1) Charged in the current indictments as murder, **rape**, torture, and persecution on political, racial, and religious grounds, extermination and deportation.
 - (2) In the *Tadic* Judgment, the Court cited elements as:
 - (a) A serious inhumane act as listed in Statute;
 - (b) Act committed in international or internal armed conflict;
 - (c) At time accused acted there were ongoing widespread or systematic attacks directed against civilian population;
 - (d) Accused knew or had reason to know he/she was participating in widespread or systematic attack on population (actual knowledge);
 - (e) Act was discriminatory in nature; and
 - (f) act had nexus to the conflict.

- (3) Crimes against humanity also acts as a gap filler to the crime of Genocide because a crime against humanity may exist where a *political group* becomes the target
- d. Grave Breaches. As defined by the Geneva Conventions, may occur only in the context of an international armed conflict. There are eight as listed in outline, above.
 - (1) Charged in indictments as willful killing, torture, inhumane treatment, and extensive destruction of property not justified by military necessity or causing great serious injury to body or health.
 - (2) The *Tadic* court found there was no international armed conflict during the time covered by the indictment and therefore victims were not protected persons. Therefore, the court felt it lacked jurisdiction to hear grave breaches because the court first determined that the conflict was purely internal. The court concluded that for a prosecution of a grave breach, the elements are:
 - (a) One of eight listed acts committed;
 - (b) International armed conflict; and
 - (c) Act committed against a protected person or property.

On July 15, 1999, the Appellate Chamber reversed the Trial Chamber and found that the conflict was international. *Tadic* was therefore found guilty of 9 counts of grave breach by the Appellate Chamber. The Trial Chamber had based its finding of not guilty solely on the grounds that the conflict was internal so the Appellate Chamber actually found him guilty of the counts rather than sending the case back to the Trial Chamber.

- (3) In the *Celebici* case, the ICTY found that the indictment covered a period of international armed conflict. Three of the four accuseds were convicted of grave breaches.
- e. Genocide. Any of the listed acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.
 - (1) Has been charged as persecution, murder, torture, serious bodily injury done to ethnic groups at detention camps, and where civilians fired

upon and killed due to national or ethnic affiliation. Includes preventing births within a group, transferring children of group, serious bodily injury to member of a group or killing members of a group.

(2) Not charged in *Tadic* case.

(3) Genocide v. “Ethnic Cleansing.” Ethnic cleansing is a subset of genocide; it is not a separate crime.

2. International Criminal Tribunal for Rwanda.

- a. Genocide. Same definition as above. Charged in all indictments for acts such as torturing or killing of Tutsis.
- b. Crimes against Humanity. Crimes when committed as part of widespread or systematic attack against any civil population on national, *political*, ethnic, racial or religious grounds.

(1) Charged in all indictments for acts such as extermination of all Tutsis in a village, murder, torture or rape of ethnic group (Tutsi) or liberal political supporters.

(2) Fills gap in definition of genocide. Authorizes prosecution for persecution on political grounds.

- c. Article 3 Common to the Four Geneva Conventions & Additional Protocol II. There are eight acts specified in the statute, including taking of hostages; violence to life, health, and physical or mental well being; terrorism; pillage; and executions without judgment by regularly constituted court. This list is illustrative, not exhaustive.

(1) These are war crimes committed in the context of an internal armed conflict and traditionally left to domestic prosecution, but made subject to international prosecution pursuant to the Rwanda Statute.

(2) Charged in all indictments for acts in which the indictee personally participated in or directed the crime. For example, running over a person with a vehicle to induce them to “talk,” burning homes, rape, and murder.

(3) *Tadic* interlocutory appellate court decision on jurisdiction held that Common Article 3 protections apply in both international or internal armed conflict. The *Tadic* judgment set out elements as follows:

- (a) An armed conflict whether international or internal;
- (b) Victim is person taking no part in hostilities;
- (c) Act against victims is one of those listed in Common Article 3 or Protocol II; and
- (d) Act committed in context of armed conflict (need not be while the conflict is ongoing).

I. International Criminal Court. The ICC will have jurisdiction over the following crimes:

1. Genocide. “For the purpose of this Statute, ‘genocide’ means ... acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group...” There does not appear to be a need to tie the crime of genocide in with an armed conflict in order for the ICC to have jurisdiction. This is consistent with the Genocide convention discussed above.
2. Crimes against Humanity. “For the purpose of this Statute, ‘crimes against humanity’ means ... acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack...” This includes acts such as murder, extermination, enslavement, deportation or forcible transfer, imprisonment or severe deprivation of physical liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, persecution against any identifiable group based on **political**, racial, national ethnic, cultural, religious, gender..., enforced disappearance, **apartheid**, and other inhumane acts.
 - a. Although arguably customary international law no longer requires it, traditionally, there had to be a link between crimes against humanity and an armed conflict.
 - b. The ICC does not specifically require the need to have a nexus with an armed conflict.

- c. However, jurisdiction exists only where the “attacks” are “widespread or systematic.” This language suggests that there must be something akin to an armed conflict or large-scale governmental abuse.
3. War Crimes. For the purposes of the ICC, war crimes means:
- a. Grave Breaches of the Geneva Conventions.
 - b. Serious violations of the Laws and Customs of War applicable in international armed conflict. The statute then goes on to list what it considers to be serious violations.
 - c. In the case of an internal armed conflict:
 - (1) Violations of Common Article 3.
 - (2) Other violations of the laws and customs of war “applicable ... within the established framework of international law.”
 - (a) The Statute provides a laundry list of these crimes from various treaties.
 - (b) It also criminalizes the attack of personnel, equipment, installations, or vehicles involved with a UN peacekeeping or humanitarian mission.

IV. COMMAND RESPONSIBILITY FOR THE CRIMINAL ACTS OF SUBORDINATES

- A. Commanders may be held liable for the criminal acts of their subordinates even if the commander did not personally participate in the underlying offenses if certain criteria are met. Where the doctrine is applicable, the commander is accountable as if he or she was a principal.
- B. As with other customary international law theories of criminal liability, the doctrine dates back almost to the beginning of organized professional armies. In his classical military treatise, Sun Tzu explained that the failure of troops in the field cannot be linked to “natural causes,” but rather to poor leadership. International recognition of the concept of holding commanders liable for the criminal acts of their subordinates occurred as early as 1474 with the trial of Peter of Hagenbach. William H. Parks, *Command Responsibility for War Crimes*, 62 MIL L. REV. 1 (1973).

- C. A commander is not strictly liable for all offenses committed by subordinates. The commander's personal dereliction must have contributed to or failed to prevent the offense. Japanese Army General Tomoyuki Yamashita was convicted and sentenced to hang for war crimes committed by his soldiers in the Philippines. Although there was no evidence of his direct participation in the crimes, the Military Tribunal determined that the violations were so widespread in terms of time and area, that the General either must have secretly ordered their commission or failed in his duty to discover and control them. Most commentators have concluded that *Yamashita* stands for the proposition that where a commander *knows or should have known* that his subordinates were involved in war crimes, the commander may be liable if he or she did not take reasonable and necessary action to prevent the crimes. *U.S. v. Tomoyuki Yamashita*, Military Commission Appointed by Paragraph 24, Special Orders 110, Headquarters United States Army Forces Western Pacific, 1 Oct. 1945. William H. Parks, *Command Responsibility For War Crimes*, 62 MIL L. REV. 1 (1973).
- D. Army Policy. "The commander is responsible if he ordered the commission of the crime, has actual knowledge, or *should have knowledge*, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the *necessary and reasonable* steps to insure compliance with the law of war or to punish violators thereof." FM 27-10, ¶ 501; *see also* TC 27-10-3 at 19-21.
- E. Protocol I, art. 86. Represents the first attempt to codify the customary doctrine of command responsibility. The *mens rea* requirement for command responsibility is "*knew, or had information, which should have enabled them to conclude*" that war crimes were being committed and "*did not take all feasible measures* within their power to prevent or repress the breach."
- F. The International Criminal Tribunals for the Former Yugoslavia & Rwanda.
1. "Individual Criminal Responsibility: The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he *knew or had reason to know* that the subordinate was about to commit such acts or had done so and the superior failed to take the *necessary and reasonable measures* to prevent such acts or to punish the perpetrators thereof." Rept of the Secretary-General; Statute for Rwanda, art. 6(3).

2. Indictments against Radovan Karadzic (as founding member and President of Serbian Democratic Party) and Gen. Ratko Mladic (Commander of JNA Bosnian Serb Army) highest ranking Bosnian-Serb military leaders. (command responsibility)
3. Indictments against Theoneste Bagosora (assumed official and *de facto* control of military and political affairs in Rwanda during the 1994 genocide) and Jean Paul Akayesu (bourgmestre (mayor), responsible for executive functions and maintenance of public order within his commune), high ranking civilian officials in the Rwandan national and local governments, respectively. (superior responsibility)

G. Operations Other Than War.

1. Law of War may not apply. The operation may involve an internal armed conflict or no conflict at all.
2. DOD policy is that the Law of War applies in all operations irrespective of how the operation is classified, including MOOTW. *See*, DoDD 5100.77, *The Law of War Program*, and CJCS 5810.01, *Implementation of the DOD Law of War Program*.
3. Despite this policy, it is questionable whether a commander could be held liable in a domestic court-martial for the unlawful acts of the commander's subordinates based on the Yamashita "should have known" standard.
 - a. Command Responsibility is a theory of criminal liability that traditionally has only been applied in international armed conflicts. It does however appear in the ICTY and ICTR statutes.
 - b. It is U.S. Army Policy that soldiers be tried in courts-martial rather than international forums. FM 27-10, *The Law of Land Warfare*, para. 507 (July 1956).
 - c. No separate crime of command responsibility or theory of liability, such as conspiracy, for command responsibility in UCMJ.
 - d. UCMJ, art. 77, Principals. For a person to be held liable for the criminal acts of others, the non-participant must share in the perpetrators purpose of design, and "assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist...." Where a person has a duty to act, such as a security guard, inaction alone may create liability.

However, Art. 77 suggests that *actual knowledge*, not negligence based knowledge, is required.

(1) At the court-martial of Captain Medina for his alleged participation in the My Lai incident in Vietnam, the military judge instructed the panel that they would have to find that Medina, the company commander, had actual knowledge in order to hold him criminally liable for the massacre. Captain Medina was not physically present at My Lai at the time of the crimes and was acquitted of the charges.

(2) Accordingly, it appears that in domestic courts-martial, a prosecutor must establish actual knowledge on the part of the accused. *See U.S. v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973); *U.S. v. Medina*, C.M. 427162 (A.C.M.R. 1971).

V. THE PROSECUTION AND DEFENSE OF WAR CRIMES

A. International v. Domestic Crimes

1. Built on the concept of national sovereignty, jurisdiction traditionally follows territoriality or nationality.
2. In war crimes prosecutions, the veil of sovereignty is pierced.
3. Universal international jurisdiction first appeared in Piracy cases where the goal was to protect trade and commerce on the high seas, an area generally believed to be without jurisdiction.
4. Universal jurisdiction in war crimes first came into being in the days of chivalry when the warrior class asserted its right to punish knights who had violated the honor of the profession of arms irrespective of nationality or location. The principle purpose of the law of war eventually became humanitarianism. The international community argued that crimes against “God and man” transcended the notion of sovereignty.

B. Current Jurisdictional Bases.

1. International Tribunal.
 - a. Ad hoc.
 - b. UN Charter.

- c. Separate treaty.
2. Constitutional.
- a. Congress has the power to define and punish offenses against the Law of Nations. U.S. Const., art. I, § 8(10).
 - b. Congress has the power to “provide for the common defense.” Art. I, § 8(1).
 - c. Congress has the power to provide and maintain a Navy, Art. I, § 8(13), and to raise and support Armies. Art. I, § 8(12).
 - d. Congress is given authority to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” Art. I, § 8(11).
 - e. Congress has the authority “To make rules for the Government and Regulation of the land and naval Forces.” Art. I, § 8(14).
 - f. Congress has the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Art. I, § 8 (18).
 - g. The President is the “executive Power.” Art. II, § 1(1), who has the duty to “take Care that the Laws be faithfully executed.” Art. II, § 3.
 - h. The President is the Commander in Chief of the Army and Navy, Art. II, § 2(1), and has the power to appoint and commission officers of the United States. Art. II, § 3(1)
 - i. Treaties are the supreme law of the land. Art. VI, cl. 2. *See generally Ex Parte Quirin*, 317 U.S. 1, 26 (1942) (reviewing constitutional underpinnings for military commissions).
3. Statutory
- a. UCMJ, art. 18. Authorizes the military to try by general court-martial anyone subject to trial for violations of the law of war.
 - b. UCMJ, art. 21. Authorizes the use of military commissions, tribunals, or provost courts to try individuals for violations of the law of war.

- c. 18 U.S.C. § 2441. Authorizes the prosecution of individuals in federal court if the victim or the perpetrator is a U.S. national (as defined in the Immigration and Nationality Act) or member of the armed forces of the U.S., whether inside or outside the U.S..
 - (1) After the My Lai incident, several soldiers were able to escape prosecution because they had ETS'd and no longer were subject to the UCMJ.
 - (2) Jurisdiction attaches if the appropriate accused commits:
 - (a) A Grave Breach.
 - (b) Violations of certain listed articles of the Hague Conventions.
 - (c) Violations of Common Article 3 of the Geneva Conventions, and of Protocol I or Protocol II of the Geneva Conventions when and if the U.S. becomes parties to either of the Protocols.
 - (d) Violations of Protocol II to the Amended Conventional Weapons Treaty.

C. The Choice of Forum

1. International Tribunals.

- a. Because no permanent international court for the trial of war crimes exists, this category of forum requires ad hoc creation by special international agreement, as occurred in the creation of the International Military Tribunal at Nuremberg by the London Agreement of 8 August 1945, and as occurred in the provision for subsequent proceedings at Nuremberg by Control Council Law No. 10 of 20 December 1945. *See generally* DA Pam 27-161-2 at 224-33.
- b. International Tribunals for the Former Yugoslavia and Rwanda were established by UNSC Resolutions. The UNSC exercised its authority under Chapter VII of the U.N. Charter to take measures to restore international peace and security. UNSC resolutions are binding on all UN Member States. UN Charter, arts. 48, 49.

2. General Courts-Martial.

- a. Punishment may be any permitted by the law of war. UCMJ, art. 18.

- b. For a capital case, the court must consist of a military judge and not less than five members. UCMJ, arts. 16, 18.
 - c. All rights and procedures provided under the Rules for Courts-Martial, the Military Rules of Evidence, and the Punitive Articles shall apply. *See* MCM, pt. I, & 2.b.(1).
3. Military Commissions.
- a. Have concurrent jurisdiction with general courts-martial. UCMJ, art. 21.
 - b. Historically used not only for war crimes trials but also for violations of Occupation Ordinances and orders of Theater Commanders. *See e.g.*, OPPENHEIM § 172 (“But an occupant may, where necessary, set up military courts instead of the ordinary courts . . .”). *See also* FM 27-10, & 373 (noting that in situations dictating the suspension of the ordinary courts of justice of the occupied territory, “the occupant may establish courts of its own and make this measure known to the inhabitants.”).
- (1) Authority Under U.S. Municipal Law. “[Military commissions have jurisdiction] with respect to offenders or offenses that by . . . the law of war may be tried by military commissions, provost courts, or other military tribunals.” UCMJ, art. 21.
 - (2) Have withstood statutory, treaty-based, and constitutional challenges before the Supreme Court. *See Ex Parte Quirin*, 317 U.S. 1 (1942); *In Re Yamashita*, 327 U.S. 1 (1945).
 - (3) Absent action by the President pursuant to art. 36, UCMJ, to set rules and procedures, and in the absence of applicable international law, military commissions “shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial.” MCM, pt. I, & 2(b)(2).
 - (4) In theory, could provide very limited evidentiary and procedural formality, *see e.g.*, *Yamashita*, 327 U.S. 18, and a very streamlined appeal process. *Cf. Eisentrager v. Forrestal*, 174 F.2d 961 (1949) (finding that German nationals, confined in custody of the U.S. Army in Germany following conviction by military commission of having engaged in military activity against the U.S. after surrender of Germany, had substantive right to writ of habeas corpus to test legality of their detention).

(5) But treaty obligations provide a floor of procedural rights, at least as to offenses by prisoners of war, which preclude military commissions in this category of cases.

(a) *See* GPW, art. 102 (“A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.”); GPW, art. 85 (“Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.”).

(i) *Cf.* *Yamashita*, 327 U.S. 22 (construing predecessor to art. 102 as applying only to judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war and not to pre-capture offenses).

(ii) *See also* Howard S. Levie, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 321 n. 29, 335 n. 98, 383 (1976); IV Pictet at 413-14; 2 Final Record of the Diplomatic Conference of Geneva of 1949 389-90; John N. Moore, et. al., NATIONAL SECURITY LAW 373 (1990).

4. Forum Considerations Connected to Status of the Accused.

a. U.S. soldiers. Tried at court-martial under appropriate provisions of the UCMJ or if separated from the military, possibly 18 U.S.C. § 2441.

b. Civilians Accompanying the U.S. Forces.

(1) If a declared war, then same forum as for U.S. soldiers. *See* UCMJ, art. 2(a)(10).

(2) UCMJ jurisdiction, both personal and substantive, over civilians accompanying the force exists only during “time of war.” UCMJ, Art. 2(10). This time of war qualifier has been interpreted to require an actual declaration of war. Therefore, civilians accompanying the force may not be charged with violations of the UCMJ unless they are accompanying the force in a declared war. *U.S. v. Averette*, 41 C.M.R. 363 (1970). However, in theory, it may be possible to try civilians, both American and foreign, at a court-martial for war crimes, rather

than for specific violations of the UCMJ, even where war has not been officially declared. UCMJ, Art. 18 not only grants substantive UCMJ jurisdiction over civilians that meet the personal jurisdictional requirements of Art. 2(10), but it also states that, “General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal....” There have been occasions where both US and foreign civilians, not accompanying the force, have been tried by US military tribunals for law of war violations. *US v. Schultz*, 4 C.M.R. 104 (1952); *Madsen v. Kinsella*, 343 U.S. 341 (1952); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Ex Parte Quirin*, 327 U.S. 1 (1942). Although all of these cases either involve law of war violations that occurred during a declared war or during occupation, they stand for the proposition that jurisdiction over law of war violations may exist even where jurisdiction based on an accompanying the force theory may not.

- c. Enemy Prisoners of War and Civilians.
 - (1) For post-capture offenses, try by general courts-martial if civilian. If a POW, try by general courts-martial or at other appropriate level of disposition under the UCMJ. *See* UCMJ, art. 2(a)(9).
 - (2) For pre-capture offenses, try civilians by either military commission or general courts-martial. Try POW by general court-martial or at other level of disposition under UCMJ as would be appropriate for a U.S. soldier similarly charged.
- 5. Potential Defenses. *See generally* R.C.M. 916; DA Pam. 27-161-2 at 245-251.
 - a. Military Necessity. Action was demanded by military circumstances and was done to prevent a greater harm; does not apply as a defense to the taking of human life.
 - b. Mistake of Fact. Traditional mistake of fact defense.
 - c. Mistake of Law. Ignorance of the law may be asserted as a defense in war crimes trials.
 - d. Duress.

- (1) Traditional View. (*Law Reports of Trials of War Criminals*, U.N. War Crimes Commission (1949) Vol. XV, p. 174).
- (a) The act charged was done to avoid an immediate danger both serious and irreparable;
 - (b) There was no other adequate means of escape; and
 - (c) The remedy was not disproportionate to the evil.
 - (d) *Einsatzgruppen* case. “Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No Court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever.”
- (2) ICTY, *Prosecutor v. Erdemovic*. Duress does not afford a complete defense to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings. (See also R.C.M. 916(h)).
- (a) With war crimes and crimes against humanity, large numbers of victims not unusual.
 - (b) Will be considered in mitigation.
 - (c) Even though it often coexists with the defense of superior orders, it is not the same defense.
 - (d) It is irrelevant that the victims will die anyway.
- (3) International Criminal Court. Duress is a defense where:
- (a) Crime caused by threat of imminent death or of continuing or imminent serious bodily harm against that person or another,
 - (b) The person acts necessarily and reasonably to avoid the treat,
 - (c) Provided the person does not intend to cause a greater harm than the one sought to be avoided.

- e. Reprisals. Otherwise illegal acts done in response to a prior illegal act by the enemy. Requirements must be met, and it must be properly authorized. See FM 27-10, & 497.
- f. Alibi.
- g. Superior Orders. *See generally* R.C.M. 916(d); FM 27-10, & 509; Dep't of Navy, NWP 1-14M, Annotated Supplement to The Commander's Handbook on the Law of Naval Operations, & 6.1.4. *See* Military Judge Benchbook, Instruction, 5-8-1, Obedience to Orders - Unlawful Order.
 - (1) This is a very limited defense:
 - (2) The accused did not know the order was unlawful; and
 - (3) A person of ordinary sense and understanding would not have known the order was unlawful.
 - (4) According to many, Superior Orders is more along the lines of mitigation than a defense. It is not recognized as a defense in the ICTY or ICTR. However, it is clearly a defense in domestic courts-martial. It is also recognized as defense in the ICC treaty.
- h. Considerations for the trier of fact when applying the defense of superior orders.
 - (1) Obedience to lawful orders is the duty of every member of the military.
 - (a) Failure to obey may place the mission, other soldiers, or civilians at risk.
 - (b) The soldier should receive a degree of immunity for his willingness to follow the orders of a commander.
 - (c) The soldier should receive a degree of immunity for being willing to engage in life-threatening activity.
 - (2) Subordinates cannot be expected scrupulously to weigh the legal merits of orders received in combat.
 - (a) Virtually all military activities would be criminal if committed in peacetime.

(b) Combat involves a significant deviation from moral norms.

(c) Unlike domestic courts, international forums do recognize that a soldier cannot possibly know all the law on the subject.

(3) Certain laws of warfare may be controversial.

- i. Prohibited Defense before the International Criminal Tribunals for the Former Yugoslavia and Rwanda. “Individual Criminal Responsibility: The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.” Rwanda Statute.
- j. International Criminal Court. The elements of a Superior Orders Defense are:
 - (1) The person was under a legal obligation to obey orders of the Government or the superior in question,
 - (2) The person did not know that the order was unlawful; and
 - (3) The order was not manifestly unlawful.

6. Presumption of Innocence.

7. Penal Sanctions. The punishment for violations of the law of war must be proportionate to the seriousness of the offense. The death penalty may be imposed for grave breaches of the Geneva Conventions. See FM 27-10, & 508.

8. Charging Considerations. *See generally* FM 27-10, & 507b; R.C.M. 307(c)(2).

VI. U.S. OBLIGATIONS, IMPLEMENTING LEGISLATION, AND POLICIES

A. The U.S. shoulders the following obligations as a matter of treaty-made law, and to a less clearly-defined extent, customary international law:

1. To enact laws to ensure effective punishment of those committing grave breaches. *See* GWS, art. 49, cl. 1; GWS Sea, art. 50, cl. 1; GPW, art. 129, cl. 1; GC, art. 146, cl. 1.
 2. To search out and either prosecute or extradite those who have committed grave breaches. *See* GWS, art. 49, cl. 2; GWS Sea, art. 50, cl. 2; GPW, art. 129, cl. 2; GC, art. 146, cl. 2.
 - a. The United States has jurisdiction, as a matter of international law, to try and punish all war criminals that fall into its hands, whether or not the offenses have been committed against Americans. *See* OPPENHEIM § 257c. In this sense, there is universality of war crimes jurisdiction among states. *See* FM 27-10, ¶ 507.
 - b. Universality of jurisdiction over war criminals was part of customary international law well before the 1949 Geneva Conventions. *See Israel v. Eichman*, Israel District Court of Jerusalem, Dec. 12, 1961, *reprinted in* II Leon Freidman, *THE LAW OF WAR: A DOCUMENTARY HISTORY* 1627, 1631-35 (1972); *see also* William B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177-218 (1945).
 - c. Obligation was limited by the Dayton Peace Accord for Former Yugoslavia for IFOR. “IFOR personnel will have the authority to detain any persons who may be indicted for war crimes, but they will not try to track them down.” Operation Joint Endeavor Fact Sheet, p.2, No. 0004-B, (Dec. 7, 1995).
 3. To “take measures necessary for the suppression” of simple breaches. *See* GWS, art. 49, cl. 3; GWS Sea, art. 50, cl. 3; GPW, art. 129, cl. 3; GC, art. 146, cl. 3.
 4. To provide accused persons “safeguards of proper trial and defense.” *See* GWS, art. 49, cl. 4; GWS Sea, art. 50, cl. 4; GPW, arts. 105-08, 129, cl. 4; GC, art. 146, cl. 4.
 5. To pay compensation--“if the case demands”--for the grave breaches committed by members of its armed forces. *See* H IV, art. 3; GWS, art. 51; GWS Sea, art. 52; GPW, art. 131; GC, art. 148.
- B. U.S. law and policy operate to discharge these obligations.
1. New U.S. legislation has been passed to meet these obligations.

- a. 1996 National Defense Authorization Act (NDAA) redefined “war criminal” to include war criminals indicted by the Tribunals for the Former Yugoslavia and Rwanda.
 - b. 1996 NDAA amended the extradition law to allow for extradition by the U.S. to the Tribunals (non-states).
 - c. 1996 War Crimes legislation created a established federal jurisdiction over those who commit a grave breach on a U.S. national or member of the armed services, and over U.S. nationals and members of the armed services who commit a grave breach on another. The law was recently amended to allow for prosecution of violations of Common Article 3, certain violations of the Hague Convention, and for violations of Protocol II of the Amended Conventional Weapons Treaty. 18 U.S.C. § 2441.
2. As discussed below, Congress has provided general courts-martial and military commissions with requisite authority to try and punish war criminals effectively. UCMJ, arts. 18, 21.
- a. Because the international law of war is part of the law of the land, see U.S. Const., art. VI, these courts can directly apply international law in trials, outside the U.S., of enemy personnel charged with war crimes. No recourse need be made to substantive criminal statutes of the U.S.. *See* FM 27-10, & 505e.
 - b. Violations of the law of war committed within the U.S. by those not subject to the punitive articles of the UCMJ will usually constitute violations of federal or state criminal laws. They should be prosecuted under these municipal laws. *See* FM 27-10, & 507b.
 - c. Violations of the law of war that constitute grave breaches or violations of Common Article 3 are now subject to prosecution under federal law, if the perpetrator or the victim is a national of the U.S. or a member of the U.S. armed forces, if the perpetrator is found in the U.S. after the crime is committed, or if such activity occurs within the U.S.. War Crimes Act of 1996, 18 U.S.C. § 2441.
 - d. Violations of the law of war committed by persons subject to the UCMJ usually will constitute violations of the UCMJ and, if so, will be prosecuted thereunder. *See* FM 27-10, & 507b.

3. Executive branch policies require the prompt reporting and investigation of alleged war crimes as well as appropriate disposition of resulting cases under the UCMJ. DoD Dir. 5100.77 at ¶ C.3. & E.2.e.(2)-(3); FM 27-10, & 507.
 - a. The U.S. Army has designated its Criminal Investigation Command as an investigative asset. *See* Dep't of Army, Regulation 195-2, *Criminal Investigation Activities* at ¶ 3-3(7) (30 Oct. 1985).
 - b. The Army has designated Reserve Component International/Operational Law Teams to investigate and report on violations of the law of war. *See* Dep't of Army, Regulation 27-1, Judge Advocate Legal Service at ¶ 11-6b(1) (3 Feb. 1995).
 - c. If involved in a prolonged armed conflict, a directive at the level of the unified combatant command or lower will likely dictate a specific investigative procedure.
 - (1) *See e.g.*, Headquarters, Military Assistance Command, Vietnam, Directive 20-4, Inspections and Investigations of War Crimes (18 May 1968), *reprinted in* Major General George S. Prugh, *LAW AT WAR: VIETNAM 1964-1973* 136-39 (1975);
 - (2) *See also* Headquarters, U.S. Armed Forces Central Command, Regulation Number 27-25, Reporting and Documentation of Alleged War Crimes (9 Feb. 1991) (Persian Gulf conflict).
4. The foregoing investigative policies and procedures, combined with the law of war training program in place in the U.S. armed forces, discharge the obligation to suppress breaches. *See, e.g.*, Dep't of Army, Regulation 350-41, Training in Units, Ch. 14 (19 Mar. 1993). U.S. policy places significant responsibility for the prevention of war crimes with the individual soldier, who is expected to recognize patently illegal orders. *See* FM 27-10, & 509; TC 27-10-3, & 14-16; Dep't of Army, STP 21-1-SMCT, *Soldier's Manual of Common Tasks*, Skill Level 1, at 727-28 (1 Oct. 1990).
5. Official inquiries yield recommendations on how to avoid similar crimes in the future. The inquiry in the aftermath of the My Lai incident associated the following factors with an increased potential for war crimes in a unit:
 - a. High friendly losses.
 - b. High turnover rate in the chain of command.

- c. A tendency to dehumanize the enemy by the use of derogatory names or epithets.
 - d. Poorly trained or ill-disciplined troops.
 - e. Inexperienced troops.
 - f. No clearly defined enemy.
 - g. Unclear orders.
 - h. “Body-count” syndrome. *See e.g.*, Lieutenant General W.R. Peers, THE MY LAI INQUIRY 229-237 (1979). By inculcating the lessons of such incidents through instruction, officers participate in discharging the U.S. obligation to suppress both grave and simple breaches.
6. Using authority derived from statute, *see* UCMJ, art. 36, the President prescribes rules governing pretrial, trial, and post-trial procedures that comply with GPW, arts. 105-08.

APPENDIX

War Crimes Act of 1996 (as amended)

18 U.S.C. § 2441. War crimes

(a) Offense.--Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.--The circumstances referred to in subsection (a) are that the person committing such breach or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition.--As used in this section the term 'war crime' means any conduct--

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non- international armed conflict; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.